In the Carroll Circuit Court

State of Indiana,	)	Case No. 08C01-2210-MR-1
	)	
Plaintiff,	)	The Honorable Frances C. Gull,
	)	Special Judge
v.	)	
	)	
Richard M. Allen,	)	
	)	
Defendant.	)	

Defendant's Counsel's Motion for Summary Denial of the State's Verified Information for Contemptuous Conduct

Counsel for the Defendant, Richard Allen, Andrew Baldwin and Bradley Rozzi, by counsel, now come before the Court with their Motion for Summary Denial of the State's Verified Information for Contemptuous Conduct ("Information"), filed on January 29, 2024. For the reasons that follow, the Court should summarily deny the State's Information.

Introduction

The State's Information has many flaws. Not least among them is its failure to allege, either directly or by inference, either Mr. Baldwin or Mr. Rozzi committed any of the supposed offending acts willfully. *See* Ind. Code § 34-47-3-1 (defining indirect contempt as "willful disobedience" of a court order).

But the State's information has two additional flaws that are fatal. First, to the extent the State's Information purports to allege indirect civil contempt, it fails to allege any act injuring the State that a remedial or coercive contempt sanction could redress. The State therefore lacks standing to pursue its Information as one for indirect civil contempt, and this Court lacks jurisdiction to consider it.

Second, because there is no available remedial or coercive contempt sanction, any contempt sanction would necessarily be punitive and therefore for

a finding of indirect *criminal* contempt. But to pursue indirect criminal contempt against Messrs. Baldwin and Rozzi, the State would have to file its Information in a *separate* criminal case. It has not done so, and this Court has no authority *to punish* Messrs. Baldwin and Rozzi for indirect criminal contempt in this criminal case against Mr. Allen.[1]

Finally, were the Court to impose, without jurisdiction or authority to do so, any necessarily punitive sanction on the State's Information in this criminal case against Mr. Allen, it would be at least the second time the Court has interfered with Mr. Allen's Sixth and Fourteenth Amendment rights to counsel. *See* *Strickland v. Washington*, 466 U.S. 668, 683 (1984) ("The Court has considered Sixth Amendment claims based . . . on state interference with the ability of counsel to render effective assistance to the accused." (Citations omitted).)[2]

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[1] This is the written motion required by Indiana Original Action 2(A), which provides in relevant part:

> [N]o petition for a writ of mandamus or prohibition will be entertained unless the Relator has raised the jurisdictional question by written motion which the trial court has denied or not ruled upon timely. The motion shall allege the absence of jurisdiction of the respondent court or the failure of the respondent court to act when it was under a duty to act.

[2] At least one other time, of course, was when, on October 12, 2023, in an email, the Court ordered Messrs. Baldwin and Rozzi to stop their work on Mr. Allen's behalf for at least a week. State interference with counsel in violation of the Sixth Amendment is structural error for which prejudice is presumed. *E.g.*, *Weaver v. Massachusetts*, 582 U.S. 286, 308 (2017). *See also Strickland*, 466 U.S. at 686 ("Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."); *Geders v. United States*, 425 U.S. 80, 91 (1976) (Sixth Amendment right to counsel violated without showing of prejudice for trial judge's interference with defendant's right to consult with counsel).

Notwithstanding so-called *Younger* abstention because it may well not apply—*see generally*, *Younger v. Harris*, 401 U.S. 37 (1971)—further state interference with his lawyers could well compel Mr. Allen to seek federal habeas relief under 28 U.S.C. 2241(c)(3) in the form of an injunction. Were Mr. Allen to prevail in that undertaking, a conditional writ of habeas corpus, though using more formal legal

. . . Footnote continued next page . . .

1. The State's Information has not alleged an injury a civil contempt sanction can remedy; the State therefore lacks standing to pursue its Information as one for civil contempt; and this Court lacks jurisdiction to consider it.

a. The State's Information attempts to allege Messrs. Baldwin and Rozzi committed acts of indirect contempt.

As a matter of law almost older than dirt, there are two kinds of contempt: direct and indirect.

> Contempt of court generally involves disobedience of a court or court order that "undermines the court's authority, justice, and dignity." *In re A.S.*, 9 N.E.3d 129, 131 (Ind. 2014) (citing *State v. Heltzel*, 552 N.E.2d 31, 34 (Ind. 1990)). There are two kinds of contempt: direct contempt and indirect contempt. *Id*. Indirect contempt, which is at issue in this case, involves those acts "committed outside the presence of the court 'which nevertheless tend to interrupt, obstruct, embarrass or prevent the due administration of justice.'" *Id.*at 32. (quoting 6 Ind. Law Encyc. Contempt §2 (1958)).

Reynolds v. Reynolds, 64 N.E.3d 829, 832 (Ind. 2016). It should not be a matter of dispute that the State's Information at least *attempts* to allege Messrs. Baldwin and Rozzi committed indirect contempt. None of the acts the State's Information alleges were contemptuous occurred in the Court's presence or about which the Court, itself, has knowledge. *See In re Nasser*, 644 NE 2d 93, 96 (Ind. 1994) (direct contempt depends on "the judge possess[ing] personal knowledge of the contemptuous act." (Citing *Hopping v. State*, 637 N.E.2d 1294, 1297 (Ind. 1994)).

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language, would look something like: "Release Mr. Allen or leave his lawyers alone." But win or lose, federal court is not a railroad siding Chief Justice Rush likely had in mind when she said at the hearing on the *second* original action involving this Court in this case: "My concern is getting this case back on track." Hearing, January 18, 2024, at c. 14:25, State ex rel. Allen v. Carroll Cir. Court, Indiana Supreme Court No. 23S-OR-311.

b. Sanctions for indirect civil contempt must be remedial or coercive for the benefit of an aggrieved party; sanctions for indirect criminal contempt are punitive.

As a second matter of law almost older than dirt, direct and indirect contempt each come in two varieties: civil and criminal. Sanctions for civil contempt are "for the benefit of the party who has been injured or damaged by the failure of another to conform to a court order issued for the private benefit of the aggrieved party." *In re A.S.*, 9 N.E.3d 129, 132 (Ind. 2014) (quoting *Duemling v. Fort Wayne Community Concerts, Inc.* (1963), 243 Ind. 521, 524, 188 N.E.2d 274, 276). Sanctions for civil contempt also must be "either remedial or coercive." *In re A.S.*, 9 N.E.3d at 132 (citing *Duemling*, 234 Ind. at 524, 188 N.E.2d at 276); *see also State ex rel. McMinn v. Gentry* (1951), 229 Ind. 615, 619, 100 N.E.2d 676, 678 ("The object of a civil contempt is the enforcement or protection of the rights of the complainant, and only a coercive or remedial judgment may be entered."). Federal authority is no different. *See Gompers v. Sears Roebuck & Co.*, 211 U.S. 418, 441 (1911) ("[F]or civil contempt the punishment is remedial, and for the benefit of the complainant.") (on certiorari to the District of Columbia Court of Appeals); *accord United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994) (on certiorari to the Virginia Supreme Court); *De Manez v. Bridgestone Firestone North American Tire, LLC*, 533 F.3d 578, 590 (7th Cir. 2008).

Criminal contempt, on the other hand, is "'an act directed against the dignity and authority of the court which obstructs the administration of justice and which tends to bring the court into disrepute or disrespect.'" *State v. Heltzel*, 552 N.E.2d 31, 34 (Ind. 1990); *accord In re A.S.*, 9 N.E.3d at 132. Sanctions for criminal contempt are intended to vindicate the authority of a court. *E.g.*, *Cowart v. White*, 711 N.E.2d 523, 530 n.3 (Ind. 1999); *Brown v. Brown* (1932), 205 Ind. 664, 666, 187 N.E. 836, 837.

c. The State's Information alleges no injury a civil contempt sanction can meaningfully redress, and the State's resulting lack of standing to pursue its Information means the Court has no jurisdiction to consider it.

Even were the Court to take as true every allegation of the State's Information, no sanction imposed for *any* of the alleged contemptuous acts would remedy an injury to the State; nor would it coerce Messrs. Baldwin or Rozzi to comply with any order of the Court the State's Information alleges they violated. *See* Ind. Code § 34-47-3-5(c) (governing indirect contempt) ("The court shall, on proper showing, extend the time provided under subsection (b)(3) to give the defendant a reasonable and just *opportunity to be purged of the contempt*." (Emphasis added)); *Reynolds*, 64 N.E.3d at 835 ("[C]ivil contempt orders avoid punishing the contemnor by allowing the party to be purged of contempt." (Citation omitted).).

The State therefore has no standing to pursue its Information. "The standing requirement is a limit on the court's jurisdiction which restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury." *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 (Ind. 1990); *accord* *Hammes v. Brumley*, 659 N.E.2d 1021, 1029 (Ind. 1995); *Solarize Indiana, Inc. v. Indiana Gas & Electric Co.*, 182 N.E.3d 212, 219 (Ind. 2022). "[O]nly those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing." *State ex rel. Cittadine v. Indiana Dep't of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003). "Absent this showing, complainants may not invoke the jurisdiction of the court." *Id.*; *accord* *Miller v. State*, 19 N.E.3d 779, 783 (Ind. Ct. App. 2014).

Without an injury meaningfully redressable by a civil contempt sanction, the State simply does not have standing to pursue its Information, and this

Court does not have jurisdiction to consider it. *Miller*, 19 N.E. 3d at 784 ("Because Miller did not have standing to bring his contempt motion, the trial court did not have jurisdiction and should have dismissed his motion.").

Accordingly, the Court should summarily deny the State's Information.

2. The State's Information can only be seeking punitive sanctions for criminal contempt; the State filed it in the wrong place; and this Court has no authority to impose a criminal sanction in this criminal case against Mr. Allen.

a. Without an available remedial or coercive sanction, any sanction imposed by the Court, whether imprisonment or a fine, would be punitive, thus making the object of the State's Information a finding of indirect criminal contempt.

As a third matter of law almost older than dirt, "a fixed sentence of imprisonment is punitive and criminal if it is imposed retrospectively for a completed act of disobedience such that the contemnor cannot avoid or abbreviate the confinement through later compliance." *Bagwell*, 512 U.S. at 828–29 (cleaned up) (quoting and citing *Gompers*, 221 U.S. at 443). Similarly, "a flat, unconditional fine totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." *Bagwell*, 512 U.S. at 829 (cleaned up); *accord De Manez*, 533 F.3d at 590.

b. An information for indirect criminal contempt must be filed in a separate criminal action.

As a fourth matter of law almost older than dirt, if the State, by its Information, is seeking punitive sanctions for indirect criminal contempt, it filed its Information in the wrong place. "A proceeding for indirect criminal contempt" must "be filed as an independent action" and "must also be prosecuted by the State." *Allison v. State ex rel. Allison* (1963), 243 Ind. 489, 494, 187 N.E.2d 565, 568; *accord Thompson v. Thompson*, 811 N.E.2d 888, 906 (Ind. Ct. App. 2004). *See also State v. Heltzel*, 552 N.E. 2d 31, 32 (Ind. 1990) ("William Heltzel and

Mark Kiesling were charged with indirect contempt of court . . . in an information filed by the Lake County Prosecutor . . . ."); *McMinn*, 229 Ind. at 619, 100 N.E.2d at 678 (" A charge of criminal contempt should be prosecuted by the State against the defendant, in an independent action . . . ."); *Denny v. State ex. inf. Brady* (1932), 203 Ind. 682, 706, 182 N.E. 313, 321 ("[T]he information for a criminal contempt should be entitled State of Indiana vs. the defendant and filed as an independent action and prosecuted by the State."); *Jones v. State*, 847 N.E.2d 190, 195 (Ind. Ct. App. 2006) ("*[I]n a separate action*, the State charged Jones with indirect contempt, under Indiana Code Sections 34-47-3-1 and 34-47-3-5, for her failure to appear at the October 7th deposition." (Emphasis added)).[3]

c. The Court has no authority to impose any punitive sanction for indirect criminal contempt in this criminal case against Mr. Allen.

The Court simply may not impose *any* punitive sanction for what could only be a finding of criminal contempt in this criminal case against Mr. Allen. That would amount to a conviction and punishment on a charge the State has not made. The situation would be no different from that in *McMinn*: "McMinn was convicted on a charge not made, which is a 'sheer denial of due process.' *DeJonge v. Oregon* (1937), 299 U.S. 353. See also *Thornhill v. Alabama* (1940), 310 U.S. 88. Therefore, the judgment and commitment issued thereon are void. *Johnson v. Zerbst* (1938), 304 U.S. 458." 229 Ind. at 620, 100 N.E.2d at 678 (parallel citations omitted).

Accordingly, for this second reason, the Court should summarily deny the State's Information.

[3] Not only was the State's Information filed in the wrong place but, as written, it also fails to make out a criminal charge. It does not allege Messrs. Baldwin and Rozzi acted willfully, omitting a material element of indirect contempt; this is not remedied by any reference in the Information to § 34-47-3-1, which defines indirect contempt as "willful disobedience" of a court order.

Conclusion

For the foregoing reasons, Messrs. Baldwin and Rozzie respectfully request the Court summarily deny the State's Verified Information for Contemptuous Conduct.

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Certificate of Service

I affirm under penalty for perjury that on February 7, 2024, the foregoing was served on opposing counsel, Nicholas McLeland, by e-filing.

/s/ Michael K. Ausbrook
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